IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEX & SMITH PROFESSIONAL ASSOCIATES, LTD.	:	CIVIL ACTION
v.	:	
WILMINGTON PROFESSIONAL ASSOCIATES, INC.	:	NO. 98-6422

ORDER

AND NOW, this 18th day of May, 1999, upon consideration of Defendant's motion to dismiss the Plaintiff's complaint,[1] the Plaintiff's response, and the reply thereto, IT IS ORDERED that Defendant's motion is DENIED in part[2] and GRANTED in part.[3] Count III of

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[1] Lex & Smith Associates ("Lex & Smith") filed this diversity action against Wilmington Professional Associates ("WPA") seeking unpaid commissions under a written referral contract. The contract specifies that WPA shall pay a commission to Lex & Smith when Lex & Smith refers clients to WPA for billing services. The amount of the commission is a percentage of the amount which WPA's clients collect from their patients as a result of WPA's billing services. Count I asserts that WPA breached the referral contract by refusing to pay commissions to Lex & Smith. Count II seeks an accounting of unpaid commissions after an audit of WPA's customer lists. Count III seeks both compensatory and punitive damages based on an assertion that WPA's actions constitute conversion.

[2] WPA moves to dismiss the entire complaint under Fed. R. Civ. P. 12 (b)(1), alleging that Lex & Smith has failed to satisfy the jurisdictional requirement that the amount in controversy exceed $75,000. See 28 U.S.C. § 1332 (a). In response to WPA's motion to dismiss, Lex & Smith submitted the affidavit of its President, who is also a shareholder of WPA, in which it claims that WPA has failed to pay commissions on fees derived from six Pennsylvania health care providers, and that Lex & Smith is owed commissions on these clients in the amount of either $77,200 or $154,400, depending on the applicable commission rate. See Affidavit of William Lex, ¶ 12. The plaintiff bears the burden of proving that the requirements for diversity jurisdiction have been satisfied. See Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir.), cert. denied, 510 U.S. 964 (1993).

A complaint may only be dismissed for failure to plead the required amount in controversy, however, when it appears "to a legal certainty that the claim is really for less than the jurisdictional amount;" otherwise the plaintiff's good faith allegations of the amount in controversy will control. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-29

(1938); Spectator Mgmt. Group v. Brown, 131 F.3d 120, 122 (3d Cir. 1997), cert. denied, 118 S. Ct. 1799 (1998); Suber v. Chrysler Corp., 104 F.3d 578, 583 (3d Cir. 1997). Even excluding its claim for punitive damages contained in Count III, Lex & Smith has alleged that the amount in controversy is, at the least, $77,200, which exceeds the jurisdictional requirement of $75,000. Though WPA disputes the good faith of Lex & Smith's allegation, its contention is based solely on its version of pre-Complaint settlement discussions between the parties that are not part of the record before the court. See WPA's Reply Brief, at 2-3. As the court has no basis to doubt the good faith of Lex & Smith's allegation that the parties' dispute involves at least $77,200, particularly given the specificity with which the component parts of that sum are calculated in Lex's affidavit, the court is not "certain that the jurisdictional amount cannot be met." Suber, 104 F.3d at 583 (quoting Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538, 541 (3d Cir. 1995)). WPA's reliance on Breault v. Feigenholtz, 380 F.2d 90, 92 (7th Cir. 1967), is inapposite, for that case explicitly distinguishes cases like this one, where the plaintiff seeks a "money judgment or decree." Id. Lex & Smith has thus, adequately pled an amount in controversy above the jurisdictional limit

[3] WPA moves to dismiss Lex & Smith's conversion claim, Count III of the complaint, pursuant to Fed. R. Civ. P. 12 (b)(6), claiming that the economic loss doctrine prevents Lex & Smith from recovering in tort for a breach of contract. See WPA's Brief, at 6-7. Lex & Smith responds that, under Pennsylvania law, the economic loss doctrine applies only in products liability cases and that courts have often allowed recovery in tort and in contract simultaneously, for otherwise a victim of conversion would be deprived of a complete remedy if the tortfeasor simultaneously breached a contract. See Lex & Smith's Brief, at 5-11. The parties appear to agree that, for purposes of resolving at least the motion to dismiss, the court should apply Pennsylvania law. Pennsylvania law does not permit a plaintiff to collect punitive damages for the breach of a contract, but allows a successful plaintiff to collect punitive damages for conversion, if the tortious conduct was outrageous. See Francis Bernhardt, III, P.C. v. Needleman, 705 A.2d 875, 879 (Pa. Super. Ct. 1997); Johnson v. Hyundai Motor Am., 698 A.2d 631, 639 (Pa. Super. Ct. 1997), appeal denied, 712 A.2d 286 (Pa. 1998). The parties' dispute is thus essentially over Lex & Smith's entitlement to pursue punitive damages.

To resolve the parties' dispute, the court must determine whether Count III properly sounds in contract or in tort, a tangled question, given the "confused state" of Pennsylvania law. Redevelopment Auth. of Cambria Cty v. International Ins. Co., 685 A.2d 581,590 (Pa. Super. Ct. 1996). Though Pennsylvania state courts have developed two different tests for evaluating whether a claim asserts a breach of contract or a tort, the majority of those courts appear to have adopted the "gist of the action" test, under which an action will be "construed as a tort action, [if] the wrong ascribed to the defendant [is] the gist of the action with the contract being collateral . . . a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly." Id.; Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 663 A.2d 753, 757 (Pa. Super. Ct. 1995); see also Factory Market, Inc. v. Schuller Int'l Inc., 987 F. Supp. 387, 394 (E.D. Pa. 1997) (predicting that the Pennsylvania Supreme Court would adopt the "gist of the action" test); Allied Fire & Safety Equip. Co. v. Dick Enter., Inc., 972 F. Supp. 922, 936-

37 (E.D. Pa. 1997) (concluding that "gist of the action" test is more persuasive and that competing misfeasance/nonfeasance test has been abandoned by Pennsylvania state courts). Pennsylvania courts also recognize that "the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus." Phico, 663 A.2d at 757 (citing Bash v. Bell Tel. Co., 601 A.2d 825, 829-30 (Pa. Super. Ct. 1992)); see also Factory Market, 987 F. Supp. at 394. Applying this test to Count III, it is clear that Lex & Smith is asserting, in essence, another version of its breach of contract claim contained in Count I. As in Phico, and Factory Market, WPA's asserted duty to pay commissions to Lex & Smith arises only as a result of the parties' contract, and WPA's contractually-defined obligations are central, rather than collateral to, the conversion claim. As the gist of Count III is WPA's asserted breach of contract, Lex & Smith cannot recover in tort for the same alleged wrong.

The economic loss doctrine provides another way of reaching the same result. This doctrine prevents plaintiffs "from recovering in tort economic losses to which their entitlement flows only from a contract" and thus circumventing the bar on collecting punitive damages for breaches of contract. Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995); Craig v. Salamone, No. 98-3685, 1999 WL 213368, at *8 (E.D. Pa. Apr. 8, 1999); Hemispherx Biopharma, Inc. v. Asensio, No. 98-5204, 1999 WL 144109, at * 12 (E.D. Pa. Mar. 15, 1999); Sun Co. v. Badger Design & Constr., Inc., 939 F. Supp. 365, 371 (E.D. Pa. 1996) ("tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement"). Despite Lex & Smith's assertions to the contrary, the economic loss doctrine is not confined to the realm of products liability actions, though it originated there. See Duquesne, 66 F.3d at 619; Valley Forge Convention & Visitors Bureau v. Visitor's Serv., Inc., 28 F. Supp. 2d 947, 951 (E.D. Pa. 1998); Allied Fire, 972 F. Supp. at 938; Bash, 601 A.2d at 829. In Count III, Lex & Smith asserts only that it has suffered the loss of commissions which it believes WPA has withheld, a purely economic injury. See Valley Forge, 28 F. Supp. 2d at 951 (finding that economic losses include damages from loss of customers, sales, profits, business reputation and goodwill); Eizen, Fineburg & McCarthy, L.L.P. v. Catalink Direct, Inc., No. 98-5561, 1998 WL 856565, at * 1 (E.D. Pa. Dec. 11, 1998). As Lex & Smith has suffered a purely economic loss, the loss of profits from commissions, and its contract with WPA determines its entitlement to those commissions, Lex & Smith's tort claim is barred by the economic loss doctrine.

The cases on which Lex & Smith relies to support its contention that conversion and breach of contract claims can proceed simultaneously are distinguishable from the case at bar. In Bernhardt, the court allowed an attorney who was owed a referral fee under a fee-sharing agreement to bring a conversion claim against another attorney who refused to honor the fee-sharing agreement because the court found that the Rules of Professional Conduct gave the plaintiff attorney a property interest in the settlement of contingent fee litigation. See Bernhardt, 705 A.2d at 878. When such a property interest is lacking, as in this case, the court noted that "failure to pay a debt is not conversion." Id. In situations more like Lex & Smith's, courts have refused to allow plaintiffs seeking purely economic losses to pursue conversion claims based on a breach of contract. See Communications Programming, Inc. v. Summit Mfg., Inc., No. 98-253,

the Complaint is DISMISSED.

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William H. Yohn, Jr., J.

1998 WL 329265, at * 5 (D.N.J. June 16, 1998) (applying NJ law but finding that PA law was the same); Peoples Mortgage Co. v. Federal Nat'l Mortgage Ass'n, 856 F. Supp. 910, 929 (E.D. Pa. 1994); Montgomery v. Federal Ins. Co., 836 F. Supp. 292, 301-02 (E.D. Pa. 1993) (dismissing conversion claim in part because "an action for conversion will not lie where damages asserted are essentially damages for breach of contract").